

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CARMEN ERNST</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>USD 267</b>	)	
Respondent	)	Docket No. 1,023,547
	)	
AND	)	
	)	
<b>EMPLOYERS MUTUAL CASUALTY CO.</b>	)	
Insurance Carrier	)	

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) requested review of the April 9, 2007, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on July 25, 2007. Terry J. Torline, of Wichita, Kansas, appeared for claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant had a 17.5 percent permanent partial impairment of function to the left lower extremity based on an average of the ratings from Drs. George Fluter and Steven Howell. The ALJ also found that claimant had a 5 percent permanent partial impairment of function to the whole body attributable to her low back injury based on the rating of Dr. Fluter. The ALJ calculated these as separate awards rather than converting the rating to the left lower extremity to a rating to the body as a whole and then combining that rating with the rating for the low back impairment.

For purposes of this review, the Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

Respondent requests review of the ALJ's findings concerning the nature and extent of claimant's impairment and disability. Specifically, respondent argues that Dr. Fluter's

25 percent permanent partial impairment rating to claimant's left lower extremity is not properly supported by the *AMA Guides*.<sup>1</sup> Respondent also argues that the ALJ erred in awarding claimant an impairment for the low back, since claimant did not report low back symptoms to Dr. Flutter when she first saw him on February 6, 2006. In the event the Board agrees that claimant is entitled to a functional impairment for her low back, respondent contends the ALJ improperly calculated her permanent partial impairment. Respondent argues that the impairment rating regarding claimant's lower extremity should be converted to a whole body impairment and then combined with claimant's impairment rating for her low back using the Combined Values Chart in the *AMA Guides*.

Conversely, claimant requests that the ALJ's Award be affirmed in all respects.

The issues for the Board's review concern the nature and extent of claimant's disability and what compensation is due, specifically:

(1) Did the ALJ err in finding claimant had a 17.5 percent permanent partial impairment to the left lower extremity?

(2) Did the ALJ err in finding that claimant had a 5 percent permanent partial impairment to her low back?

(3) Did the ALJ err in calculating claimant's award?

#### **FINDINGS OF FACT**

Claimant is a farmer who was employed by USD 267 as a part-time bus driver in December 2004. On April 8, 2005, she was involved in a traffic accident when another driver ran a stop sign and struck the school bus she was driving. Along with cuts and bruises, claimant suffered injuries to her left leg. Claimant was admitted to the hospital and was released two days later. She soon developed compartment syndrome in her leg and was sent to Dr. Steven Howell on April 14. Dr. Howell performed surgery on claimant's leg that same day.

After all this, claimant developed a staph infection. She was admitted to the hospital on June 17, 2005, for surgery. She was then put in a vacuum pack and was required to have the pack on at all times, except that she was allowed to have her foot in a down position for 1 1/2 hour per day. The other 22 1/2 hours per day claimant was lying down with her foot above the rest of her body or sitting with her foot up. The vacuum pack was taken off on August 3, 2005. Claimant was released to return to work on September 15, 2005.

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Howell was claimant's primary physician for her left leg. Although claimant told Dr. Howell that she was having low back problems, none of his records mention a problem with her low back. However, Dr. Howell acknowledged that he does not treat backs. In September 2005, claimant, on her own, went to see a chiropractor about her low back. The chiropractic treatments to her low back helped but did not relieve her symptoms entirely. Claimant believes her back is bothering her because she was lying flat on her back or sitting with her leg elevated from the date of the accident until after the vacuum pack was removed.

Claimant was seen by Dr. Paul Stein for her low back problems. Following the September 29, 2005, preliminary hearing, Judge Barnes entered an order that found "[t]he parties agree that Dr. Paul Stein is the authorized treating physician for all treatment related to Claimant's back and hips . . . ."<sup>2</sup> Dr. Stein sent claimant to physical therapy a few times, where they taught her stretching exercises. She has benefitted somewhat from those exercises. Other than the chiropractic treatments with Dr. Betts, she has had no other treatment for her back.<sup>3</sup>

Claimant has gone back to part-time work driving a bus. She is performing work on her farm. During harvest, she drove the combine and a truck. From time to time, she will still elevate her leg. Claimant does exercises for her back but still has problems.

The injury to claimant's left leg causes her to walk differently. The left leg is always tight, and she takes smaller steps with her left leg than with her right. If she hits a dip, she either goes wildly that way or falls. She has leg pain associated with walking. Her leg seems to tighten up in the knee area. She also has pain in her low back.

Claimant falls about once a week while walking when she hits a dip or goes off a sidewalk wrong. When she fell while walking, it was because her leg is stiff. Claimant also has trouble going down steps. She has to roll off the front of a step and needs arm rails for security when she goes up stairs. During harvest, if she needs to check something on the top of the combine or grain wagon, she is unable to do so because she is not stable enough.

Dr. Steven Howell, a board certified orthopedic surgeon, first saw claimant on April 14, 2005, for evaluation of her left calf. Claimant had been in a motor vehicle accident and presented to him with evidence of compartment syndrome. Dr. Howell said that no other injuries were brought to his attention. He performed surgery to decompress the superficial posterior compartment of her left leg on April 14. He saw claimant again on

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<sup>2</sup> ALJ Order (Oct. 3, 2005) at 1.

<sup>3</sup> The ALJ's October 3, 2005, Order also provided that the parties agreed that Dr. Betts' bill would be paid by respondent as an unauthorized medical treatment expense.

May 10, 2005, and her incision was healing. However, he was not ready to take all of her sutures and staples out. On May 26, 2005, he removed the rest of her sutures. He also cleaned a dead area of skin from the back of her calf. The area of the back of claimant's leg that had the dead skin area became infected, and on June 17 he again performed surgery on the claimant's leg. Claimant had necrotic wounds and an abscess in the back of her calf muscle. The necrotic skin was removed, the abscess was washed out, and antibiotic beads were placed in the infected wound. Dr. Howell also started her with a wound vac to help pull fluid away and let the tissue try to heal from inside out.

Dr. Howell saw claimant in early July 2005, and her wound was healing, but she had not straightened her knee out for awhile and was having knee contracture. Dr. Howell was going to send her to therapy, but claimant thought she could work it out on her own. By the middle of July, claimant was able to do that. By the middle of August 2005, claimant's wound had healed, and she had good extension of the knee good range of motion of the knee and ankle. By September, claimant was able to drive, and on September 14, 2005, Dr. Howell released her to drive a bus. On November 16, 2005, Dr. Howell determined that claimant had reached maximum medical improvement. He released her from treatment with no work restrictions and gave her a permanent impairment rating.

Based on the *AMA Guides*, Dr. Howell found that claimant had a 10 percent permanent impairment rating to her left leg. Dr. Howell did not provide an impairment rating to any other part of claimant's body. He did not remember claimant ever complaining to him about low back pain that she attributed to either the accident or her leg condition. If she had complained of low back pain, he would have documented those complaints and perhaps referred her to another doctor.

Claimant returned to see Dr. Howell on December 28, 2005, complaining of increasing problems with cold and crampy feelings in her left leg, with occasional burning, pain and tightness around her calf. Dr. Howell had a nerve conduction test performed, which revealed that claimant had peripheral neuropathy. Dr. Howell last saw claimant on January 11, 2006, at which time she refused medication to help with the peripheral neuropathy. Dr. Howell did not prescribe any further medication or therapy for claimant's left leg. He did not believe that claimant's period of incapacitation would have caused a low back injury, nor did he observe claimant having a limp.

Dr. George Flutter, who is board certified in physical medicine and rehabilitation, examined claimant on February 6, 2006, at the request of her attorney. Dr. Flutter took a history, reviewed medical records, and examined claimant. He found that she had suffered a soft tissue crush injury to the left leg that led to the development of a compartment syndrome affecting the left calf. As a result of the compartment syndrome, claimant had a fasciotomy on the left lower extremity with delayed wound closure. Claimant also developed a staphylococcal infection in the soft tissues of the left lower extremity, requiring debridement and installation of antibiotic beads. He related all these problems to her automobile accident on April 8, 2005.

Based on the *AMA Guides*, Dr. Flutter opined that claimant sustained a permanent partial impairment to the left lower extremity of 25 percent. Dr. Flutter recommended that claimant use a pressure stocking or TED hose to control any swelling that might occur.

At the time Dr. Flutter examined claimant in February 2006, she was still experiencing swelling in her left leg. Although claimant did not complain about her back, Dr. Flutter noted that she also walked with a limp. He stated that when people limp or have an altered gait, that can affect other parts of their bodies, such as the opposite extremity or the back.

Dr. Flutter's examination of claimant on February 6, 2006, was devoted primarily to her left lower extremity. Dr. Flutter saw claimant a second time on March 29, 2006, at which time he focused on her problems with her low back. He took a history from her that was related to her back. Claimant reported that she was on bed rest with her left leg elevated for approximately 5 1/2 months following the accident. After she was allowed up, she had back pain that radiated into the buttocks and into both legs. She reported to Dr. Flutter that she is always stiff and sore. Dr. Flutter examined claimant's back. He found that simulated trunk rotation did not cause pain, but simulated axial loading did. There was no evidence of widespread pinch tenderness, overreaction, or non-anatomic distribution of pain/sensory loss. There was tenderness to palpation over the PSIS bilaterally and over the sacroiliac joints bilaterally. There was tenderness to palpation in the buttocks muscles bilaterally. There was minimal tenderness to palpation in the lower lumbar paravertebral muscles bilaterally. There was no tenderness to palpation over the greater trochanters bilaterally. He did not find any muscle spasm.

Dr. Flutter diagnosed claimant with low back pain and myofascial pain affecting the low back and buttocks. He opined that there was a causal relationship between claimant's current back condition and the motor vehicle accident of April 8, 2005. He believed her back problems were a result of the combination of her altered gait and deconditioning that occurred because of her prolonged bed rest.

Dr. Flutter recommended restrictions of lifting, carrying, pushing and pulling only up to 20 pounds occasionally and 10 pounds frequently. He recommended that claimant restrict bending, stooping and twisting to an occasional basis. He also recommended that claimant have imaging studies, including plain x-rays and an MRI, of the lumbar spine to determine if structural pathology is present. He also recommended a trial of water-based therapy and a TENS unit trial, as well as medication.

Dr. Flutter prepared a third report on May 12, 2006, in which he provided a rating based on information that had been generated on March 29. Based on the *AMA Guides*, he rated claimant as having a DRE Category II impairment of the lumbosacral spine, for a 5 percent permanent partial impairment to the body as a whole.

**PRINCIPLES OF LAW**

K.S.A. 44-510d states in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

...  
(16) For the loss of a leg, 200 weeks.

...  
(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

(b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

K.A.R. 51-7-8(c)(4) states: "An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule."

K.S.A. 44-510e(a) states in part:

If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of

disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Casco*,<sup>4</sup> the Kansas Supreme Court stated:

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or

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<sup>4</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, Syl. ¶¶ 7, 8, 9, 10, 11, *reh. denied* (2007).

any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with K.S.A. 44-510d.

K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.

K.S.A. 44-510c(a)(2) requires that the disability result from a single injury and that condition may be satisfied by the application of the secondary injury rule.

Casco addressed combinations of scheduled injuries and determined that they could not be treated as general body disabilities. Casco, however, did not change the longstanding rule that combinations of scheduled injuries with nonscheduled injuries should be treated together as general body disabilities. In *Bryant*,<sup>5</sup> the Supreme Court held:

If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

### **ANALYSIS**

It is not disputed that claimant suffered a permanent impairment to her left leg. Claimant has proven she also suffered a back injury as a direct and natural consequence of her April 8, 2005, accident.

Claimant's initial leg injury resulted in her developing compartment syndrome, for which she underwent surgery. The surgery and hospitalization resulted in a staph infection. As a result of these conditions, claimant was required to lie in bed or sit with her leg elevated for months. During this time, she developed back pain. When she began

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<sup>5</sup> *Bryant v. Excel Corp.*, 239 Kan. 688, 689, 722 P.2d 579 (1986); see also *Reese v. Gas Engineering & Construction Co.*, 219 Kan. 536, 548 P.2d 746 (1976); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Bergemann v. North Central Foundry, Inc.*, 215 Kan. 685, 527 P.2d 1044 (1974); *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 506 P.2d 1175 (1973); *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972); *Fogle v. Sedgwick County*, 9 Kan. App. 2d 129, 673 P.2d 465 (1983), *aff'd* 235 Kan. 386, 680 P.2d 287 (1984).



walking, it was with an antalgic gait, which further aggravated her back and caused a permanent impairment. Dr. Howell did not document claimant's back complaints, but this is not surprising as he does not treat backs. Claimant sought chiropractic treatment on her own in September 2005. Respondent and its workers compensation insurance carrier were aware in September 2005 that claimant was obtaining this treatment for her back with Dr. Betts and were aware that she was relating her back condition to her work accident. The ALJ ordered Dr. Betts' bill to be paid by respondent in October 2005. Thereafter, claimant was authorized to treat with Dr. Stein for her back. He sent claimant for physical therapy.

Dr. Howell did not assign a permanent impairment to claimant's back, but Dr. Fluter did. When Dr. Fluter examined claimant in March 2006, he made objective findings of a back injury and found claimant's pain complaints to be credible and consistent with his objective findings. He likewise made a causal connection between claimant's back condition and her motor vehicle accident of April 8, 2005 due to a combination of deconditioning from her prolonged inactivity and her altered gait.

### **CONCLUSION**

Taking into consideration the opinions of both Drs. Howell and Fluter, the Board finds that claimant sustained a 17.5 percent permanent impairment of function to the left leg. This converts to a 7 percent permanent impairment to the body as a whole. Claimant also sustained a 5 percent permanent functional impairment to her back which, when combined with the leg injury, results in a total functional impairment of 12 percent. There is no claim for a work disability (a permanent partial disability higher than the percentage of functional impairment).

The Board notes that the ALJ awarded claimant's counsel a fee for his services. However, the record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated April 9, 2007, is affirmed as to the nature and extent of claimant's disability and percentages of impairment of function, but the calculation of the permanent partial disability award is modified as follows:

Claimant is entitled to 31.42 weeks of temporary total disability compensation at the rate of \$92.16 per week or \$2,895.67 followed by 47.83 weeks of permanent partial

disability compensation at the rate of \$92.16 per week or \$4,408.01 for a 12 percent functional disability, making a total award of \$7,303.68, which is ordered paid in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**CONCURRING AND DISSENTING OPINION**

The undersigned agree with the majority's factual findings and their determinations that claimant's accident arose out of and in the course of her employment with respondent, including the injuries to her left leg and back, and that claimant is entitled to the percentages of functional impairment for her injuries. However, we disagree with the majority's conclusion that the claimant's percentage of functional impairment for her scheduled injury to her lower extremity should be combined with her percentage of functional impairment for her general body injury to her back for a single permanent partial disability award based upon the total of all her impairments. We read *Casco* to require these injuries to be compensated as separate injuries.

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

. . .

K.S.A. 44-510e permanent partial disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.<sup>6</sup>

Applying the "secondary injury rule," the Supreme Court in *Casco* found claimant sustained simultaneous parallel injuries to his upper extremities (shoulders). Nevertheless, instead of combining the permanent impairment of function percentages for these two shoulder injuries into a single percentage of functional impairment to the body as a whole, the court concluded that "the claimant's award must be calculated as a permanent partial disability in accordance with K.S.A. 44-510d."<sup>7</sup> As such, the so-called parallel injury rule was not applied so as to take the parallel upper extremity injuries out of the schedule and compensate them as a general body disability under K.S.A. 44-510e.

In *Casco*, when discussing *Honn*<sup>8</sup> and its parallel injury rule as it relates to the statutes defining permanent total disability, permanent partial disability, scheduled injuries and general body disabilities, the Supreme Court makes an analogy to baseball.

The Workers Compensation Act calculates compensation for injured workers in a specific and sequential manner, their order defined by statute as precisely as the four bases on a major league baseball diamond. *Honn* essentially allows the claimant, after successfully reaching first base, to be waved home and exempted from traversing to second and third bases, thus improperly converting a single into a home run.<sup>9</sup>

The majority, by combining the injuries to the left leg injury with the back injury and awarding a general body disability, is skipping over K.S.A. 44-510d and, in effect, converting a single into a home run.

Because the lower leg is contained within the schedule of K.S.A. 44-510d(a), claimant's disability to that extremity must be compensated according to the schedule at the 200 week level. The back, however, is not contained within the schedule and, therefore, must be compensated as a general body disability under K.S.A. 44-510e.

All of claimant's injuries occurred as a direct result of a work-related accident. Nevertheless, claimant's left lower extremity injury is contained within the schedule of injuries in K.S.A. 44-510d. Therefore, claimant's permanent disability resulting from her

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<sup>6</sup> *Casco*, Syl. ¶¶ 7, 10.

<sup>7</sup> *Id.*, Syl. ¶ 9.

<sup>8</sup> *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 (1931).

<sup>9</sup> *Casco* at 527.

lower extremity injury is compensable as a separate scheduled injury based upon her percentage of functional impairment for that injury alone

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BOARD MEMBER

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BOARD MEMBER

c: Terry J. Torline, Attorney for Claimant  
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge